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Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL HEFFRON, *et al.*,
Petitioners,

v.

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF OF RESPONDENTS

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Questions Presented

1. Do the First and Fourteenth Amendments allow a state to ban nondisruptive distribution of religious literature and orderly solicitation of religious contributions in the open, public areas of a state fairground?

2. Is such expulsion of speech, press, and religious exercise from a public forum rendered constitutional by the state's permission to engage in exclusively oral religious discussion in the fair's open areas (on pain of possible arrest if such discussion crosses the line between dialogue and solicitation), and to rent a booth at which fairgoers already interested enough to approach may be handed literature and asked to make donations?

3. Can the confinement of such distribution and solicitation to fixed booths be justified by invoking the one purpose that closely fits the rule requiring such confinement: insulating fairgoers from messages they have not affirmatively sought out?

4. Do the supposed secondary purposes of such a rule—preventing disorder and policing fraud—suffice to support the rule's invocation to bar First Amendment activities that are neither fraudulent nor disorderly in themselves, where less restrictive alternatives are available to alleviate such problems?

5. Does the state's duty to govern evenhandedly preclude enforcing the booth rule against commercial but not religious or political enterprises?

6. Would sustaining the invalidation of the booth rule as to non-commercial distribution and solicitation leave the state helpless to cope with confusion and congestion at its annual fair?

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF OF RESPONDENTS

Statement of the Case

The Minnesota State Fair annually attracts 1,320,000 visitors, an average of more than 115,000 each day.[1] With their minds open to new experiences, and with time on their hands, these fairgoers are an unusually receptive audience.[2]

At issue in this case is Rule 6.05 of the Rules and Regulations of the Minnesota State Fair ("the booth rule"),

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[1] First Heffron Affidavit, para. 10, at A. 26-27. All references to the Joint Appendix herein are cited as "A. —."

[2] First Beca Affidavit, para. 7, at A. 11.

which classifies as a misdemeanor the "[s]ale or distribution of any . . . printed or written material except under license issued [by] the [Minnesota Agricultural] Society and/or from a duly licensed location . . . ."[3] State authorities have construed the rule[4] to forbid not only the sale or distribution of literature, but also the exhibition of such literature[5] and the solicitation of donations[6] throughout the 125-acre fairgrounds of the annual Minnesota State Fair. This case challenges the validity of the booth rule as construed to relegate to fixed, rented booths the distribution and voluntary receipt of religious literature, and the peaceful solicitation and voluntary donation of religious contributions. The question is whether Minnesota may employ this sweeping ban to avoid the possible abuses of dis-

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[3] Stip. of Facts, para. 13, at A. 34.

[4] Stip. of Facts, para. 16, at A. 34.

[5] *See* Stip. of Facts, paras. 16-18, at A. 34-35.

[6] *See* Opinion Below at A. 62 n.4; Brief of Petitioners ("Br. Pet.") at 3.

[7] That such abuses may have occurred or may someday occur, *see* Opinion Below at A. 72-73 (Todd, J., dissenting in part, joined by Sheran, C.J., and Scott, J.), is a point strenuously urged by petitioners. Br. Pet. at 7-9, 22 n.6, 26-27, 30-31. But this case involves a rule which indiscriminately bans both abusive and innocent distribution and solicitation. *See* Argument § I, pp. 8-9 & n. 3 *infra*. It should be stressed that respondent International Society for Krishna Consciousness, Inc. ("Krishna Consciousness"), does not seek to engage in many of the activities that the state complains will cause special problems; no dancing, chanting, or distribution of "greeting gifts" is intended. Stip. of Facts, para. 11, at A. 33-34. Furthermore, the evidence that various abuses have actually taken place is extremely sparse. No arrests or prosecutions have occurred in connection with any of the alleged abuses attributed by petitioners to Krishna Consciousness members. Only five of the 234 complaints received by the Fair in 1977 were sworn or corroborated in any other way by the record. And the complaints that have been received by the Fair appear to have been actively solicited by Fair officials who handbilled the fairgrounds

tribution or solicitation, instead of guarding against such abuses, by proceeding through civil or criminal prosecution, or by imposing other, less drastic restrictions on such activities.[8]

The state trial court, acting upon a record of stipulated facts[9] and several affidavits, sustained the booth rule in 1978, in a summary judgment for petitioners, who were defendants in a suit filed by respondents in 1977 under 42 U.S.C. §1983.[10]

In the trial court, plaintiffs sought, on their own behalf and on behalf of all members of Krishna Consciousness, permission to solicit religious contributions and distribute and sell religious literature. They did not seek to solicit

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disclaiming any intention to "sanction" religious solicitation (although such officials were under court order to permit it), and "encourag[ing]" complaints to be brought to their attention. Ewert Affidavit Exhibit A, at A. 44. Even when complaints were thus encouraged, the record shows no complaints of congestion or any problems of crowd control—the evils alleged by the state to be Rule 6.05's overriding concern. Br. Pet. 22-23, 29-32.

Finally, the trial court's 1977 temporary restraining order was so ambiguous as to make confusion over compliance all but inevitable. The order restrained the *state* from interfering with plaintiffs' "distributing religious literature or soliciting donations for religious purposes," but enjoined *plaintiffs* from "selling or inducing others to purchase religious literature . . . except at a space rented for that purpose." Temporary Restraining Order at A. 29-30. An unsubtle or unfriendly observer could easily misinterpret a permissible "distribut[ion]," followed by a "donation," with a forbidden "purchase." It is little wonder that one Krishna Consciousness member who simply showed the court's temporary restraining order to a police officer at the Fair was thereupon held in custody for 15 minutes before the police decided that it was proper to release him. Second Beca Affidavit, para. 3, at A. 39.

[8] *See, e.g.*, Opinion Below at A. 66-67.

[9] Stip. of Facts at A. 30-36.

[10] Complaint for Declaratory and Injunctive Relief, para. 1, at A. 3.

contributions for their "greeting gifts" such as flowers or small American flags, nor did they seek to dance, sing, or chant.[11] But the trial court did not tailor its injunction to reach only the abusive practices feared by the state.[12] Neither did the trial court make any finding, nor does the record show, that any proposed alternative less restrictive than the booth rule had been employed by the Fair in 1977, when the Fair's imposition of the rule was temporarily restrained,[13] or at any other time.

In the decision below, the Minnesota Supreme Court reversed the trial court's 1978 judgment and held that the booth rule impermissibly abridges respondents' First and Fourteenth Amendment rights by preventing them from exercising these rights in public places. Minnesota's highest court has thus determined that the booth rule's abridgment of First Amendment rights serves no overriding purpose of the state which cannot be adequately achieved by less restrictive alternatives.[14] Nevertheless, the State Fair and the Attorney General of Minnesota ask this Court to reinstate the trial court's 1978 judgment, to reject

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[11] Stip. of Facts, para. 11, at A. 33-34.

[12] Opinion Below at A. 62 n. 4.

[13] Temporary Restraining Order at A. 29.

[14] Even the partial dissenting opinion below agreed that Rule 6.05 as construed is an unconstitutional regulation of the distribution of literature and of the solicitation of funds. A. 70. But that opinion argued that the actual *collection* of funds at other than fixed points at the Fair potentially created "confusion" because collection involves "exchanging money . . . and . . . making change." A. 71. The opinion concluded that it would not infringe on respondents' conceded right to solicit funds, A. 74, to require all donors to walk to a rented booth and tender their donations there. "[T]he regulation is merely restrictive rather than prohibitive." *Id.* The majority dismissed this alternative without comment, and petitioners have not pressed it in this Court. *See* Argument § IV (c)(2) *infra*.

certain of the Minnesota Supreme Court's "inference[s] [from the record as] arguably improper," [15] and to determine that, on balance, the booth rule's supposed benefits justify any adverse effects upon First Amendment freedoms.[16]

It is undisputed that the Society for Krishna Consciousness is an international missionary religious society whose mission is to preach the tenets of Krishna Consciousness, a monotheistic branch of Hinduism whose origins can be traced back almost five thousand years.[17] Many of this religion's members go out into public places to solicit donations and distribute the Society's theological publications. They receive no salary for their efforts and lead austere lives in keeping with the religious precepts of *sankirtan*, a ritual with ancient roots which requires adherents to reach out and preach to, and to solicit aid from, potentially receptive members of the public.[18] "Donations

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[15] Br. Pet. at 33.

[16] Br. Pet. at 10, 33-36.

[17] *See* Stip. of Facts, paras. 1-2, at A. 31-32.

[18] *See* Stip. of Facts, para. 5, at A. 32. The Krishna Consciousness movement counts among its primary texts the classic poetic and theological Vedic scriptures *Caitanya Caritamrta*, *Bhagavadgita*, and *Srimad-Bhagavatam*. First Beca Affidavit, paras. 13-14, at A. 13. Dr. J. Stillson Judah, Professor of the History of Religion at the Graduate Theological Union in Berkeley, California, has written that the Krishna adept is taught " 'to be kind to everyone, not to be quarrelsome, to be charitable, clean, benevolent, self-controlled, completely devoted to Krishna and free from material desires.' " *Id.*, para. 29, at A. 19, *quoting* J. Judah, *Hare Krishna and the Counterculture* 122-23 (1974). Members of Krishna Consciousness are absolutely prohibited from intoxication, drugs, and gambling; non-marital and non-procreational sex are also forbidden. *Id.*, para. 26, at A 17. Of " 'all the sacrifices mentioned in the Vedic literatures, the performance of sankirtana-yajna is most exalted.' " *Id.*, para. 23, at A. 16, *quoting Srimad-Bhagavatam*, Canto 5, Ch. 19, at 260. "[O]nly the most dedicated, compassionate and self-sacrificing devotees make [*sankirtan*] their

and book sales are the very lifeblood and principal means of support of this movement." [19]

Although respondents requested protection for the First Amendment activities in which they claimed a right to engage as members of a religious organization,[20] they made clear in oral argument below that they sought no privilege unavailable to other religious and political groups,[21] and nothing in the decision below conferred any such privilege.[22] Under the ruling below, purely commercial solicitations and enterprises may be restricted to booths or other areas selected by the Fair[23]; but those who would solicit charitable contributions for First Amendment purposes, although exempt from the booth rule, would remain subject to the full range of less restrictive alternatives that the state is free to enforce.[24]

Summary of Argument

The state seeks to banish from the open, public areas of a state fair, and to confine to fixed, rented booths, exercises

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personal full-time duty." *Id.*, para. 35, at A. 21. The distribution of Vedic texts and ideas is "the only way" Krishna Consciousness members feel that they "can save the world," *id.*, para. 41, at A. 24, and it is through the "life-blood" of "donations and scripture sales" alone, in their experience, that the distribution of such texts and ideas can be maintained. *Id.*

[19] Complaint for Declaratory and Injunctive Relief, para. 9, at A. 5.

[20] Complaint for Declaratory and Injunctive Relief at A. 3.

[21] *See* Opinion Below at A. 72 (Todd, J., dissenting in part).

[22] *See id.* Petitioners suggest the contrary, Br. Pet. at 21, but seem ultimately to recognize that "abrogating the booth rule . . . permit[s] all religious, political and news organizations . . . to engage in comparable peripatetic activities." *Id.* at 32.

[23] *See* Opinion Below at A. 64 n. 7.

[24] *See, e.g.*, Opinion Below at A. 66-67.

of speech, press, and religion lying at the very core of the First Amendment. One purpose, and one purpose only, closely fits this regime: *insulating potentially receptive listeners from messages they have not affirmatively sought out.* But that purpose discriminates against unfamiliar, unpopular, and ill-funded messages and groups, infringing the First Amendment rights of listeners and speakers alike. To be sure, other purposes, not forbidden in themselves—*e.g.,* preventing deception, harassment, and congestion—are arguably advanced by the rule the state seeks to enforce. But these purposes, the state's highest court properly found, could easily be served by alternatives far less restrictive than Rule 6.05. There is no reason for this Court to disturb that determination.

ARGUMENT

I.

The Booth Rule Totally Bans From the Open, Non-Rented Areas of a State Fairground—a Public Forum—Communications at the Core of the First Amendment.

Respondents assert the right, under the freedoms of speech, press, religious exercise, association, and assembly protected by the First and Fourteenth Amendments, to engage in the exhibition, distribution, and sale of religious books, pamphlets, and other written materials, and the solicitation of contributions to the religious body of their faith, in areas of a state fair that are generally open to the public. At issue in this case is the constitutional validity of a state rule confining all sales and distribution of "merchandise" to fixed, rented booths—a rule which, as construed by the responsible state authorities, completely prohibits *all* distribution and solicitation throughout the open,

public, non-rented areas of the Minnesota State Fair.[1] Respondents challenge the facial validity of this rule not simply insofar as it violates their own rights to engage in nondisruptive religious distribution and solicitation,[2] but also insofar as it violates the First and Fourteenth Amendment rights of all religious, political, or charitable groups that might seek to engage in leafleting and solicitation in the open, public, non-rented areas of the State Fair.[3]

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[1] *See* Stip. of Facts, para. 16, at A.34-35; Opinion Below at A.60-61, 62 n.4.

[2] *See* Stip. of Facts, para. 11, at A.33-34.

[3] Not at issue in this case is the validity of the booth rule as applied to commercial, profit-making ventures, or to solicitations of contributions in connection with items other than literature distributed to fairgoers as gifts, *but see* Br. Pet. 23, or to distribution or solicitation activities conducted in disruptive ways, *see* Stip. of Facts, para. 11, at A.33. Respondents obviously cannot be excluded from a public forum because of what others associated with them may have done. *See Healy* v. *James*, 408 U.S. 169, 181-82, 186, 190 (1972). And whether some of respondents' *own* activities might have fallen, or might in the future fall, within an unprotected category is immaterial to respondents' claim here that the booth rule itself—as construed to ban from the public areas of the Fair nonprofit, non-offensive religious, political, or charitable distribution and solicitation conducted nondisruptively, noncoercively, and non-abusively—is facially invalid under the First and Fourteenth Amendments. For respondents may challenge the booth rule as so construed even if it is assumed, *arguendo*, that their "own activities are unprotected," because the rule "substantially abridges the First Amendment rights" of the significant categories of closely related activities described above. *See Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 634 (1980); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612-13 (1973). The infringement here is indeed substantial. Rule 6.05 not merely chills but freezes these activities out of a public forum. Furthermore, no exceptions to the overbreadth doctrine apply in this case. The materials whose distribution is sought to be protected lie not at the marginally protected periphery of the First Amendment, *see FCC* v. *Pacifica Foundation*, 438 U.S. 726, 743 (1978); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976), but at the fully-protected core. *See, e.g., Village of Schaumburg*, 444 U.S. at 632; *Cantwell* v. *Connecticut*, 310 U.S. 296, 306-07 (1940); *Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938). Nor is the

In banishing such core First Amendment activities from the public areas of the Fair, the booth rule does more than merely channel the time, place, or manner in which such activities may take place. For the rule does *not* simply defer, relocate, or modulate protected expression, as a genuine housekeeping regulation would.[4] The only activities *permitted* by the booth rule—oral proselytism in the Fair's open areas, with distribution of literature and solicitation of contributions confined to fixed booths rented months in advance—are in no sense substitutes for the activities *prohibited*. For the two sets of activities differ fundamentally in terms of the speakers and listeners whose communicative needs they serve—not merely with respect to the quantity of communication the different activities can accommodate, but even with respect to the nature and content of the messages each set of activities can convey. The total ban on leafleting and solicitation in the public parks and thoroughfares of the State Fair thus cannot masquerade as a neutral or non-preclusive "time, place, or manner" regulation. "The privilege of a citizen of the United States to use the streets and parks for communication . . . must not, in the guise of regulation, be abridged or denied." *Hague* v. *CIO*, 307 U.S. 496, 515-16 (1939) (plurality opinion of Roberts, J., joined by Hughes, C. J., and Black, J.).

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solicitation at issue "commercial for overbreadth purposes," *Village of Schaumburg*, 444 U.S. at 632. Any inhibition of the distribution and solicitation at issue here is, therefore, of central First Amendment concern.

[4] *See, e.g., Cox* v. *New Hampshire*, 312 U.S. 569, 576 (1941) (upholding municipal authority to regulate the time, place, or manner of parades held in public streets). Petitioners' efforts to characterize the factual circumstances of the State Fair here as more "compelling" than those of *Cox*, *see* Br. Pet. at 31-32, are wholly misplaced, for *Cox* held only that a parade licensing requirement is not impermissible *per se*, given the obvious fact that "two parades cannot march on the same street simultaneously." *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972), *citing Cox* v. *New Hampshire*, 312 U.S. at 576.

A. *A State Fair Is a Public Forum—Literally a Marketplace of Ideas.*

The modern American state fair—an agricultural and industrial exposition which intermingles the informational and the educational with the commercial and the recreational—has its antecedents in the ancient fairs of Europe, which were, at the outset, primarily religious assemblies of worshippers and pilgrims who came together for religious feasts. Such fairs gradually yielded their dominantly sacred character to a more mercantile spirit as priests and pilgrims alike became merchants and vendors of goods and services. In mediæval Europe, the fair became a major market allowing cosmopolitan gathering and exchange. *See generally* W. Neely, *The Agricultural Fair* 3-23 (1935).

The fair as we know it in this country today is "a congeries of hawkers, vendors of wares and services, and purveyors of ideas, commercial, esthetic, and intellectual." *International Society for Krishna Consciousness, Inc.* v. *State Fair of Texas*, 461 F.Supp. 719, 721 (N.D. Tex. 1978) (temporary restraining order); 480 F.Supp. 67 (N.D. Tex. 1979) (preliminary injunction); No. CA-3-78-1279-G (N.D. Tex. July 30, 1980) (permanent injunction). It has traditionally afforded exposure not only to the products displayed, but also to an interchange of ideas, information, interests, and social contacts. By gathering together otherwise unassociated people and ideas, the fair has from time immemorial served both to broaden the horizons and to expand the awareness of the attending public.[4a] The Min-

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[4a] As one scholar concluded after an exhaustive study of the social evolution of such fairs:

> Obviously the fair in whatever age and of whatever type has furnished informally the opportunity for broadening the experience of those who have in one way or another participated in it. This is especially true of fairs in any degree cosmopolitan—the great mediæval commercial fairs, the world's fairs and expositions and, more pertinently, the great agri-

nesota Fair, no less than its ancestors, serves a wide variety of interests—"like a great daily newspaper which contains something for everyone." *A Story of the Minnesota State Fair,* Minneapolis Board of Education Bull. No. 58, at 39 (1942) (Work Projects Administration Study). The State Fair is thus an actual marketplace of ideas; to some, in fact, it is "probably our most democratic institution." *Id.* at i.[5]

In the "half-permanent . . . city . . . suddenly sprung to life" upon the fairgrounds, W. Neely, *supra,* at vii, the public thoroughfares which traverse and interconnect the various offerings of the Fair resemble nothing quite so much as they do streets, which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, [and] communicating thoughts between citizens . . . [as] a part of the privileges, immunities, rights, and liberties of citizens." *Hague* v. *CIO,* 307 U.S. at 515 (plurality opinion of Roberts, J., joined by Hughes, C.J., and Black, J.). And the most spacious and recreational areas of the Fair—those surrounding carnival rides and amusements, for example — closely resemble parks, which are, like streets, traditional public forums.[6]

> cultural fairs. Often they have constituted an important, if not the sole, point of vivid personal contact with the larger world. As such they have been and still are a source of [general] information and social intercourse, no less than a means of serving some more clearly defined end or ends.

W. Neely, *supra,* at 156.

[5] Thus the Minnesota State Fair has served as a forum, at many times throughout its history, for communication quite unrelated to its agricultural and industrial exhibits. For example, in the early decades of the 20th Century, "[n]o other fair [was] as popular as the Minnesota Fair as a stopping-place in presidential campaigns." R. Speer & H. Frost, *Minnesota State Fair: The History and Heritage of 100 Years* 111 (1964) (candidates made tours of fairgrounds and delivered speeches there).

[6] *See Hague* v. *CIO,* 307 U.S. at 515-16. *See also* National Park Service Regulations, Public Use and Recreation, Sale and

These open, public, non-rented areas of the Fair are manifestly appropriate places in which to exercise First Amendment rights both to convey and to receive ideas. Such areas provide would-be speakers with access to an ever-changing body of people in constant motion. *Cf. International Society for Krishna Consciousness, Inc.* v. *Rochford,* 585 F.2d 263, 272 (7th Cir. 1978) (airport's public, non-leased areas are appropriate forums for First Amendment activity, in part because of "very high turnover of people"). That such areas are enclosed is clearly immaterial,[7]

Distribution of Printed Matter, 36 C.F.R. § 2.39(a) (1980) (allowing "sale or distribution" of printed matter under park service permit, so long as such printed matter is "not solely commercial advertising"); National Capitol Park Regulations, Demonstrations and Special Events, *id.* § 50.19(b) (providing that "demonstrations" and "special events" may be held without official permit in five Washington, D.C., park areas); National Capitol Park Regulations, Soliciting, Advertising, [and] Sales, *id.* § 50.24(c)(2) (allowing "sale or distribution" of newspapers, leaflets, and pamphlets without official permit in all but a handful of park areas open to general public, even when "conducted without the aid of stands or structures"); National Capitol Park Regulations, Sale and Distribution of Printed Material, *id.* § 50.52(a) *(semble).*

[7] As one court which found that fairgrounds constitute a "first amendment 'public forum'" has noted, "[n]umerous public places far more enclosed and less open than fairgrounds, [*e.g.*, bus and air terminals], have been held to be first amendment forums where persons may circulate and engage in first amendment expression." *International Society for Krishna Consciousness, Inc.* v. *Bowen,* 456 F.Supp. 437, 442 (S.D. Ind. 1978), *aff'd,* 600 F.2d 667 (7th Cir.), *cert. denied,* 444 U.S. 963 (1979). That fairgrounds are enclosed neither confers privacy on fairgoers, who enter a world of unanticipated public encounters within, *see, e.g., Farmer* v. *Moses,* 232 F.Supp. 154, 162 (S.D.N.Y. 1964), nor prevents ease of motion on the Fair's public ways. *See* Argument § III (B) *infra.*

Petitioners mischaracterize the broadly informative function of the Fair when they suggest that a fairgoer enters with a preconceived "express purpose" to spend time "only on those exhibits or concessions for which he paid his entrance fee." Br. Pet. at 22-23. An individual, upon entering the Fair, does not step inescapably

as is the requirement of a nominal entrance fee.[8]

Finally, it is immaterial that the Fair is dedicated to "specific uses"—*e.g.*, agricultural or industrial displays—as well as to generalized "intercommunication." *See Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 512, 512 n.6 (1969) (public school's dedication to specific educational uses does not undercut First Amendment's protection of even symbolic speech there, especially since one activity typically pursued at public school is personal intercommunication among students). Indeed, it is for the *very purposes* of communication, exhibition, enlightenment, instruction, and exchange that the Fair is so designed. Compared to streets and parks—where communication among citizens may be both infrequent and incidental; or to courthouses—which have long been open to the public but where citizens go primarily to participate in a specialized event[9]; or to airports and bus terminals—where people go primarily for trans-

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onto some kind of conveyer belt that carries all who board it on a fixed course touching only upon those interests its passengers have already self-consciously formed. Rather, the Fair provides a unique opportunity for "expansion of [each visitor's] interests through contacts with new social groups," not as much through carefully pre-planned encounters as through "the sights, the chance meetings, the casual contacts[,] which temporarily . . . enlist the visitor's attention." W. Neely, *supra*, at 221.

[8] *See, e.g., International Society for Krishna Consciousness, Inc.* v. *Bowen, supra; Farmer* v. *Moses, supra.* That most of us must pay a public transit fare to get to the street or park in which we are then free to speak and to listen certainly does not deprive such places of their character as public forums. Such incidental expenditures of this sort—small and routine—simply facilitate entry *into* and exit *from* a public forum by speakers and listeners, but do nothing to change that forum's character as public.

[9] *See Richmond Newspapers, Inc.* v. *Virginia*, 100 S.Ct. 2814, 2827-29 (1980) (plurality opinion of Burger, C.J., joined by White and Stevens, JJ.).

portation, not communication[10]—a state fairground is a "natural and proper place[ ] for the dissemination of information and opinion." *Schneider* v. *State,* 308 U.S. 147, 163 (1939).[11]

B. *In a Public Forum, the First Amendment Protects Both the Right to Communicate, and the Right to Practice Religion, by Distributing Literature and Soliciting Contributions.*

1. Distributing Literature Is Protected.

Rule 6.05 would confine to booths all exhibition and distribution of leaflets, handbills, tracts, pamphlets, books, scriptures, and other written materials. It thus wholly excludes all such exhibition and distribution from the open, public, non-rented areas of the Fair.

Like ordinances which this Court has struck down because they barred distribution of literature in the streets, the booth rule abridges the freedom "of one rightfully upon the street to impart information through speech or the distribution of literature." *Schneider* v. *State,* 308 U.S. at 160. The freedoms of speech and press embrace the public distribution as well as the writing and printing of books and other literature, for such distribution is essential to publicize, to enlist support for, and to debate

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[10] *See, e.g., International Society for Krishna Consciousness, Inc.* v. *Rochford, supra; Chicago Area Military Project* v. *City of Chicago,* 508 F.2d 921, 925 (7th Cir.), *cert. denied,* 421 U.S. 992 (1975). *See also Wolin* v. *Port of New York Authority,* 392 F.2d 83, 89-90 (2d Cir.) (even bus terminal concourse is a public forum which, in providing access to transit and shops, "resembles a street" and is "attended with noisy crowds and vehicles, some unrest and less than perfect order"), *cert. denied,* 393 U.S. 940 (1968).

[11] State fairs are thus in no way similar to jails, *see Adderley* v. *Florida,* 385 U.S. 39, 47 (1966), or to military installations, *see Greer* v. *Spock,* 424 U.S. 828, 838 (1976)—places which this Court has treated as unsuited to the unfettered public expression of ideas, and thus as subject to restrictive regulations appropriate to their singular functions.

the opinions and beliefs expressed. Thus this Court has struck down ordinances inhibiting the distribution of literature in public places because pamphlets and similar media have served as "historical weapons in the defense of liberty." *Id.* at 162; *Lovell* v. *City of Griffin*, 303 U.S. at 452.

The distribution of religious texts, tracts, and scriptures is triply protected by the First Amendment's guarantees of free speech, free press, and free exercise of religion. *See Murdock* v. *Pennsylvania*, 319 U.S. 105, 108-09 (1943). For when Krishna Consciousness devotees seek to distribute their religious scriptures by hand at the State Fair, they engage not only in speech and press activities but in precisely what this Court has deemed "an age-old form of missionary evangelism—as old as the history of printing presses, . . . a potent force in various religious movements down through the years. . . . occup[ying] the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits." *Id.*[12]

If the First Amendment protects the distribution of literature expressing political or religious opinions or beliefs even at the doors of private homes, *Martin* v. *City of Struthers*, 319 U.S. 141 (1943); *Murdock* v. *Pennsylvania*, *supra*, it surely does so in such public forums as a state fairground. The distinct rights both of distributors and of recipients, *see Martin* v. *City of Struthers*, 319 U.S. at 143; *Marsh* v. *Alabama*, 326 U.S. 501, 508 (1946); *Jamison* v. *Texas*, 318 U.S. 413, 416 (1943), are abridged by a booth rule which bars evangelists from spreading their faith, if simply because such a restriction in effect permits only those *already* interested in that faith to obtain its holy scriptures. *See* Argument § III *infra*.

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[12] That money may be charged for some of the religious literature distributed is, of course, immaterial. *See Murdock* v. *Pennsylvania*, 319 U.S. at 111 ("[T]he mere fact that religious literature is 'sold' . . . does not transform evangelism into a commercial enterprise.").

2. Soliciting Contributions Is Protected.

Rule 6.05 would also confine to booths all solicitation of contributions to political and religious or other charitable causes, eliminating all such activities from the open, public, non-rented areas of the Fair. But the freedoms of speech, press, and religion protect such activities not only for their instrumental role in supporting other expressive endeavors, but also for their intrinsic communicative value. Solicitation is not merely a *means* of financing religious and other expression at some later time; it is itself often a *form* of such expression.

This Court has recently observed that "charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment['s freedoms of speech]," *Village of Schaumburg,* 444 U.S. at 632, in part because of "the reality that without solicitation, the flow of such [economic, political, or social] information and advocacy would likely cease." *Id.* Without solicitation as a source of support, it may prove impossible, especially for newly-organized or underfunded groups, to print, distribute, or even articulate religious messages or sacred texts. "It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern." *Murdock* v. *Pennsylvania,* 319 U.S. at 111. *See also* First Beca Affidavit, paras. 4, 42, at A.10-11, A.24.

Finally, religious solicitation, like the distribution of religious literature, is triply protected by the First Amendment because such solicitation, too, is intertwined not only with speech and press but also with religious exercise. *See, e.g., Virginia State Board of Pharmacy* v. *Virginia Citizens*

Consumer Council, Inc., 425 U.S. 748, 761 (1976); *Cantwell* v. *Connecticut*, 310 U.S. at 307. This Court has consistently distinguished religious solicitation from profit-motivated commercial appeals. *See Village of Schaumburg*, 444 U.S. at 628-32 (summarizing precedents). Not only does religious solicitation supply funds for later undertakings that are themselves not merely commercial; such solicitation also appeals for a direct, material expression of spiritual support for beliefs that lie at the heart of First Amendment protection. *Cf. Buckley* v. *Valeo*, 424 U.S. 1, 19, 20-21 (1976) (*per curiam*) (recognizing that political solicitation and contribution are *themselves* expressive acts); *id.* at 241, 244 (Burger, C.J., concurring in part and dissenting in part).

Dramatically illustrating these general principles, Krishna devotees are under a duty to "involve members of the public in service to the movement's deity through contribution," *Edwards* v. *Maryland State Fair & Agricultural Society*, 628 F.2d 282, 285 (4th Cir. 1980)—that is, to engage the listener or reader in a reciprocal act of donation. Such donation, in turn, itself constitutes a religious expression by the donor in most faiths. This case is no exception. It is a longstanding precept of Krishna Consciousness that sacrifices of material wealth in the service of Krishna are themselves spiritually purifying. *Cf. Buckley* v. *Valeo*, 424 U.S. at 20-21 (*per curiam*) (right to "speak" through campaign contributions); *id.* at 244 (Burger, C.J., concurring in part and dissenting in part).[13]

[13] Giving material contributions is itself a devotional offering linking its offeror with God. *See Caitanya Caritamrta*, Adi-lila, Ch. 9, v. 42; *Bhagavad-gita*, Ch. 9, vv. 27, 28, Ch. 18, v. 5. Where public religious solicitation is a religious ritual mandated by religious doctrine, as is *sankirtan*, *see* First Beca Affidavit, paras. 22, 32, 34, 37, at A.16, A.20-22, its prohibition even more dramatically abridges of the right of free exercise. Respondents believe that *sankirtan* must be practiced as Lord Caitanya con-

3. Allowing Discussion in a Public Forum Cannot Cure the Invalidity of Forbidding Distribution of Writings and Solicitation of Funds There.

Petitioners' offer to permit respondents to "[r]oam throughout . . . the fairgrounds . . . for the purpose of discussing with others their religious beliefs," A.62, cannot rid Rule 6.05 of its abridgment of respondents' First Amendment rights to exhibit and distribute literature and to solicit contributions throughout the fairgrounds. When this Court has struck down laws inhibiting solicitation, it has never been a defense that messages other than those requesting contributions were allowed. *See, e.g., Village of Schaumburg, supra* (ordinance affecting only solicitation). If anything, the line thus drawn amounts to forbidden content censorship. Nor, when this Court has struck down prohibitions on the distribution of writings, has it ever been a defense that oral discussion was not simultaneously forbidden. *See, e.g., Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 93-94 (1977) ("For Sale" signs banned; such alternatives as word of mouth held to be no substitute); *Schneider* v. *State, supra* (ordinance affecting handbills only). Book-burning is not excused because the author remains free to talk.

Oral communications simply cannot substitute for books, pamphlets, and other writings. The freedom of the press

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sistently performed and taught it—approaching freely every person, whether already spiritually inclined or not. *See, e.g., Caitanya Caritamrta,* Ch. 15, v. 41, Adi-lila, Ch. 8, vv. 20, 28, 34-36. This requirement plainly precludes *sankirtan's* meaningful exercise in a stationary booth, as the court below recognized. *See* A.64 n.7. Other courts have recognized similarly that *sankirtan* cannot be practiced from a booth. *See, e.g., Edwards* v. *Maryland State Fair & Agricultural Society,* 628 F.2d at 284-85. Prohibition of such a ritual in its only meaningful setting thus inflicts far more than "purely economic" harm, contrary to petitioners' conclusory speculation. *See* Br. Pet. 34-35.

obviously assures at least this much.[14] Nor should it seem surprising that it does. Persons passing through a public forum may well wish to accept a written work, and to read, and perhaps re-read, it privately later, rather than to make the larger and more conspicuous commitment of time and demonstration of interest involved in stopping to listen to the distributor's verbal articulation of its contents—and risking the disapproval of others. A written work, moreover, may be shared with and passed on intact to others. *Cf. Kaplan* v. *California,* 413 U.S. 115, 120 (1973) ("A book has a continuing life" inasmuch as "[i]t is passed hand to hand . . . and [has] a continuing impact.") (footnote omitted). And a writing may embody a great deal which the distributor believes or feels but cannot adequately capture orally—especially in the case of religious scriptures that depict or describe what the distributor takes to be revealed truth.

Although nothing in respondents' argument requires reliance on the special characteristics of their religion or of

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[14] Whatever its other implications, *see, e.g.,* Stewart, "Or of the Press," 26 Hast.L.J. 631, 634-36 (1975), the Press Clause at least establishes that the First Amendment's protections are not limited to oral narratives but extend in full to the special power of communication made possible by Gutenberg's 15th Century invention. *See* Van Alstyne, "The Hazards to the Press of Claiming a 'Preferred Position,'" 28 Hast.L.J. 761, 769 n.16 (1977).

The Anglo-American law of evidence, too, has long recognized the distinctive—indeed, the often unique—character of verbal and pictorial *writings* as opposed to oral transmissions. *See, e.g.,* IX W. Holdsworth, *A History of English Law* 154-55 (3d ed. 1944) (estoppel by deed); *id.* at 187 (laws governing the admissibility of documentary evidence); *id.* at 219-22 (relationship between documentary and oral evidence); IV J. Wigmore, *Evidence* §§ 1173-1174 (Chadbourne rev. 1972) (best evidence rule); IX J. Wigmore, *Evidence* § 2400 (1940) (parol evidence rule). In any event, the First Amendment protects not only "the cognitive content of . . . speech," *Cohen* v. *California,* 403 U.S. 15, 26 (1971), but the "emotive function," *id.,* which one medium or style of expression may be capable of serving better than another in a particular context.

its beliefs and rituals, respondents submit that their practice of *sankirtan* exemplifies in particularly striking form the truth that discussion cannot be relied upon as a substitute for written communication. For the primacy of dissemination of Vedic scriptures (and of the books and writings teaching Krishna Consciousness) over all other forms of proselytism has itself long been a fundamental tenet of faith in Krishna Consciousness. Krishna doctrine, indeed, holds that it is *only* by the distribution of devotional books or other religious writings that the slumbering spiritis of most modern souls can be awakened, that only through book distribution can new devotees be made "Krishna Conscious." *See* A. Prabhupada, *Preaching is the Essence* 30, 37, 93-94 (1977) (founder of modern Krishna Consciousness explains that book distribution is faith's most sacred evangelical duty). To a Krishna worshipper, then, talking with the unconverted is at best a vehicle for transmitting written knowledge—knowledge which, according to the devotee's faith, has no expressive equal.[15]

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[15] The respondents' Gaudiya Vaishnava faith teaches that, in the present age (Kali Yuga), people's memories, and their receptivity to spiritual life, are slight; the ancient Vedas (literally, "divinely revealed knowledge") thus cannot be effectively preserved and transmitted orally because such ancient Vedas will, by that process alone, be poorly absorbed and soon forgotten. These Vedas or spiritual teachings were therefore compiled in literary form explicitly to popularize them for assimilation by the ignorant and forgetful masses. *See Srimad-Bhagavatam*, Canto 1, Chap. 4, vv. 17-18, 24-25; *Caitanya Caritamrta*, Madhya-lila, Chap. 20, v. 353. *See also* First Beca Affidavit, paras. 12, 13, at A. 12-13. The compiler-author of these teachings, Vyasa, was foretold by these teachings to be an incarnation of Krishna Himself. *See Srimad-Bhagavatam*, Canto 1, Chap. 3, v. 40; Chap. 5, v. 21; *see also* First Beca Affidavit, para. 12, at A.12. Of these written Vedas, the "mature fruit" is the epic *Srimad-Bhagavatam*, Canto 1, Chap. 1, vv. 2, 3; Chap. 3, v. 41; it is indeed considered "the literary incarnation of God," meant to enlighten all persons in this spiritually dark age. *See id.*, Canto 1, Chap. 3, vv. 40, 43. Writing commentaries on this *Srimad-Bhagavatam* and other Vedic literature, and

C. *Restricting Distribution and Solicitation to Booths Allows Only Communications Which Listeners Take the Initiative to Seek Out or to Make; These Cannot Substitute for the Communications Such a Restriction Prohibits.*

Since the open and public areas of the Fair themselves constitute a public forum in the fullest sense, and since the freedoms to distribute texts and to solicit contributions are distinctly protected under the First Amendment, it follows that the booth rule's prohibition cannot be justified by a mere assertion that "alternatives" of some sort are available to determined speakers or to already "tuned-in" listeners. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State,* 308 U.S. at 163. And, as this Court has recently stated, there is "no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is." *Virginia State Board of Pharmacy,* 425 U.S. at 757 n.15. *See also Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 556 (1975).

Notwithstanding this settled doctrine, petitioners suggest that the First Amendment is satisfied simply because distribution and solicitation are not banned *altogether* but are permitted to occur in rented booths. The supposed "alternative" provided by confining all distribution and solicitation to such booths, however, cannot substitute, either quantitatively or qualitatively, for speaker-initiated expression

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copying (in script, or, more recently, in print) and distributing such commentaries, have occupied Vaishnava devotees in respondents' lineage for millenia, from Vyasa's compilation to the great oral and literary *sankirtan* expansion inaugurated by Sri Caitanya, whose followers wrote over half a million verses. *See Caitanya Caritamrta,* Madhya-lila, Chap. 1, vv. 33-45; Antya-lila, Chap. 4, vv. 218-31. *See also* First Beca Affidavit, para. 33, at A.20-21.

in a public forum. For the booth rule allows only those distributions which listeners take the initiative to seek out, and only those contributions which listeners take the initiative to make. But the First Amendment includes a distinct right to meet, mingle, and communicate in a public forum with those who have *not* initiated such encounters or indicated in advance their receptiveness to such communications. *See* Argument § III *infra*.[16]

The speaker's First Amendment protection embraces the right to meet and communicate with those not yet familiar with or sympathetic to his message; the religious proselytizer similarly has a right to preach or pass on the Word to the yet unconverted. To encounter, arouse interest in, awaken the consciousness of, instill commitment among, evoke an affirmative response from, and create an associational link with those previously unaware of, unaffiliated with, or unsympathetic to one's message entails communicative and associational acts qualitatively different from those acts involved when a speaker simply delivers a sought-after message, makes an invited request, or keeps a prior appointment.

The First Amendment, moreover, protects the independent right of listeners to obtain the messages of willing speakers without singling themselves out publicly as already knowledgeable about, or predisposed toward, such messages. *See Lamont* v. *Postmaster General*, 381 U.S. 301, 309 (1965) (striking down as an abridgment of ad-

[16] This right is protected not only by the Speech Clause, but also by the Assembly Clause and by the implied freedom of association. *Cf. Coates* v. *City of Cincinnati*, 402 U.S. at 615 (freedoms of association and assembly entail the right to gather in public places for social or political purposes). *See also Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 164 (1972) (freedom to walk, stroll, and wander, even without pre-arranged "purpose or object," is an historically established constitutional right).

dressees' First Amendment rights a requirement that addressees affirmatively step forward and identify themselves as interested in receiving foreign mail from Communist organizations before any such mail may reach them).

Restricting speech to booths where listeners must deliberately seek it out dramatically shrinks the size of the realistically accessible audience. Listeners obviously cannot take the initiative to seek out messages of which they are unaware, and listeners are unlikely to take the initiative to seek out messages they find it inconvenient to pursue. Thus this Court rejected as a defense to a municipal ban on "For Sale" signs the fact that the ban left alternative channels of communication open. This Court observed that advertising real estate sales in newspapers or in agent listings could not *effectively* substitute for the posting of "For Sale" signs—not least because such alternatives are "less likely to reach persons not deliberately seeking sales information." *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. at 93.[17] And one court, in holding invalid an airport booth restriction applied to the Society for Krishna Consciousness, similarly observed that the confinement of solicitation efforts to booths "is likely to discourage contributions by requiring the traveler to go to a specific location if he desires to make a contribution. Most people are unlikely to go out of their way on their own initiative to make a contribution." *International Society for Krishna*

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[17] While this Court has noted the availability of alternative means of access to speech that is vulgar or offensive in upholding geographical or temporal regulations of such speech, *see FCC* v. *Pacifica Foundation*, 438 U.S. at 750 n.28 ("Adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these [seven dirty] words."); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. at 62 (market for sexually explicit films may be satisfied by exhibition of such films within restricted area), the expression at issue here is at the core, not the fringe, of First Amendment protection. *See* Argument § I(B) *supra*.

Consciousness, Inc. v. *Griffin*, 437 F. Supp. 666, 673 (W.D. Pa. 1977).[18]

Finally, restricting distributions and contributions to those for which already attuned listeners volunteer predictably operates with especially harsh effect against unconventional, unfamiliar, unpopular, or underfinanced speakers and their potential listeners and supporters.[19] The less common and accepted the communicating group, the more it needs to reach out to the public to overcome ignorance or hostility, and the less it can expect self-propelled advances by listeners. This is so especially when a group is not only unconventional, but also conveys a message so unpopular that listeners would actually suffer possible social stigma if they were conspicuously to seek it out. *See, e.g., Lamont* v. *Postmaster General*, 381 U.S. at 307. And limiting contributions to those made by previously informed and willing listeners financially burdens most

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[18] *See also* n.38 *infra*.

[19] This Court has repeatedly expressed sensitivity to restrictions of expression which predictably fall with disproportionate force on such minority groups, whether because such regulations compel public disclosure without regard to its deterrent effect on those who fear majoritarian disapproval or retaliation, *see, e.g., Buckley* v. *Valeo*, 424 U.S. at 71, 74; *Talley* v. *California*, 362 U.S. 60, 64 (1960); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958); or because such regulations impose a license tax upon the exercise of First Amendment rights without regard to the deterrent effect of such a tax on all but those groups blessed with a "full purse," *see, e.g., Murdock* v. *Pennsylvania*, 319 U.S. at 112, 115 (invalidating potentially prohibitive fees for distributing literature); or because such regulations encumber speech and assembly in advance with time-consuming procedures without regard to the fact that, for many messages, "timing is of the essence." *See Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 162-63 (1969) (Harlan, J., concurring). The injury caused by a rule confining distribution and solicitation to booths rented in advance must similarly be evaluated, as petitioners concede, by the "degree to which the rule falls unevenly on particular groups or persons." Br. Pet. at 15.

those groups, such as "newly organized or minor cults and creeds," *Troyer* v. *Town of Babylon*, 483 F.Supp. 1135, 1139 (E.D.N.Y.), *aff'd mem. sub nom. Troyer* v. *Town of Southampton*, 628 F.2d 1346 (2d Cir.), *aff'd mem.*, 101 S.Ct. 522 (1980), which lack a large pre-existing base of support and therefore need most to solicit funds from newly-won sympathizers. Indeed, this Court has recognized that such groups must reach out with printed information, and need not be forced to wait for others to extend their hands to receive it. *See, e.g., Martin* v. *City of Struthers*, 319 U.S. at 146 ("Door to door distribtuion of circulars is essential to the poorly financed causes of little people."). Such outreach is even more necessary to obtain the funds which alone can make such distribution possible.

Taken together, the booth rule's restriction of distribution and solicitation to those contacts which the listener initiates, and the rule's imposition of a rental fee, offer an unattractive package indeed to the poor or fledgling religion. The rule commands: Pay the state from your limited resources, well in advance, a significant fee that entitles you to express yourselves and to appeal for support from that location at the Fair which least promises you a viable chance to reach out and expand your fold, and which offers you *no* chance to have the kind of interchange that a pamphleter or solicitor can have only with the fairgoer who does not seek him out.

II.

The Booth Rule's Ban Could Be Justified Only by Demonstrating a Close Fit to a Compelling State Purpose Unrelated to the Suppression of Protected Expression or of Religious Exercise.

Viewed either as (1) a complete prohibition, within the public forum defined by the State Fair's street and park areas,[20] of some messages but not others—of all written communications,[21] and of those specific oral communications that solicit charitable contributions[22]—or as (2) a selective ban, throughout the larger public forum defined by the Fair as a whole, of those written communications and those solicitations, written or oral, which are not listener-initiated,[23] Rule 6.05 would plainly require more convincing justification than "a mere time, place, and manner restriction." *Virginia State Board of Pharmacy*, 425 U.S. at 771.

But even if one were to disregard altogether the several respects in which Rule 6.05's preclusion of particular categories of protected speech and religious practice falls unevenly upon speakers and messages, the rule would still be unconstitutional unless it could be affirmatively shown to serve compelling interests unrelated to the suppression of protected activities,[24] and to "do so by narrowly drawn

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[20] *See* Argument § I(A) *supra*.

[21] *See* Argument §§ I(B)(1), I(B)(3) *supra*.

[22] *See* Argument §§ I(B)(2), I(B)(3) *supra*.

[23] *See* Argument § I(C) *supra*.

[24] Nothing turns here upon the precise characterization one employs to describe "the quality of the governmental interest which must appear." *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). That the interest must at least be weightier than the reduction of mere administrative or economic burdens is clear. *See, e.g., Schneider* v. *State*, 308 U.S. at 164. Nothing more is needed to show that

regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Village of Schaumburg*, 444 U.S. at 637; *Grayned* v. *City of Rockford*, 408 U.S. at 114, 116-17, 119; *United States* v. *O'Brien*, 391 U.S. at 376-77; *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). Moreover, even if one were to regard Rule 6.05 as nothing more than a routine regulation of time, place, or manner, and thus as subject only to the above requirements, the rule could not be upheld without at least a showing that it "leave[s] open ample alternative channels for communication of the information." *Virginia State Board of Pharmacy*, 425 U.S. at 771 (affirming this proposition even as to purely commercial speech). *See also Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. at 93 *(semble)*.

The Minnesota Supreme Court correctly held that not even such lesser burdens could be met in this case. *See* A.63-65. That "[t]he alternatives [left open by Rule 6.05] are far from satisfactory," *id.*, has already been shown. *See* Argument §§ I(B)(3), I(C) *supra*. Equally fundamental, Rule 6.05 "is not genuinely concerned with the place of the speech . . . or the manner of the speech . . . or any other value 'unrelated to the suppression of free expression,'" *id.*, *quoting International Society for Krishna Consciousness, Inc.* v. *Conlisk*, 374 F.Supp. 1010, 1015 (N.D. Ill. 1973), *quoting United States* v. *O'Brien*, 391 U.S. at 377, but with its very impact upon the consciousness of those who have not affirmatively sought it out. The only purpose that directly *or* closely fits the rule's enforcement against such expression as that proposed by respon-

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Rule 6.05 falls short of the constitutional minimum, since any interests beyond cost-saving and convenience that Rule 6.05 may arguably serve are either illegitimate, *see* Argument § III *infra*, or fit the rule too loosely to serve as its justification. *See* Argument § IV *infra*.

dents is a forbidden contraction in the marketplace of ideas itself. *See* Argument § III *infra*. As to the ancillary purposes that Rule 6.05 might indirectly serve—those purposes that are not forbidden in themselves—the rule is so imprecisely drawn and ill fitting, so substantially over- and under-inclusive, that the rule falls far short of that "[p]recision of regulation," *NAACP* v. *Button*, 371 U.S. at 438, which this Court has invariably required when activities centrally protected by the First Amendment have been at stake. *See* Argument § IV *infra*. Finally, that the rule treats religious and political expression on a par with purely profit-motivated commercial speech is certainly not a justification of the rule, but a further infirmity. *See* Argument § V *infra*.

III.

The Booth Rule's Primary Effect and Its Only Closely-Fitting Purpose—Withholding Messages From Those Who Have Not Signalled Advance Interest in or Sympathy Toward Them—Is Itself Impermissible Under the First Amendment.

By excluding all distribution of literature and solicitation of contributions from the public areas of the State Fairgrounds, Rule 6.05 corrals in booths all such speech and religious practice and all speakers and solicitors who desire to engage in such speech. The clear and manifestly calculated effect of this confinement is to limit distributions and solicitations at the the Fair to those fairgoers whose predisposition toward such communications propels them toward particular booths at which they may read, buy, or contribute in accord with a checklist prepared in advance. Petitioners concede as much when they suggest that, "if Sankirtan were limited to a booth, those fairgoers who are genuinely curious about or supportive of [Krishna Con-

sciousness] would probably visit the booth and make the necessary purchases or contributions." Br. Pet. at 35.

Petitioners indeed purport to justify the exclusion of all other fairgoers from exposure to distribution and solicitation efforts by arguing that the state has a legitimate interest in protecting the "rights of fair patrons" to be free of "unwanted speech." *Id.* at 21-23. Not only is this purported state interest not compelling; as embodied in Rule 6.05, it is *per se* impermissible.

As petitioners would have it, the state may forbid speaker-initiated contacts altogether in the absence of a potential listener's advance expression—indicated by approaching a booth—of an affirmative desire to receive particular communications. This Court rejected just such a contention in *Lamont* v. *Postmaster General,* 381 U.S. at 307. While an actual recipient may be empowered by government to shield himself from repeated intrusions by communications from a source the recipient has previously found offensive, *see Rowan* v. *United States Post Office,* 397 U.S. 728, 737-38 (1970), the state may not limit communications, especially in a public forum, to those which a potential recipient has affirmatively invited. *See* Argument § III(B) *infra.*

A. *Deliberately Preserving Ignorance of Unanticipated Messages Defies the Central Purposes of the First Amendment.*

Curtailing free expression until it is coextensive with the pre-existing sensibilities of its recipients would shrink the marketplace of ideas beyond recognition. The First Amendment protects expression not merely as an outlet, but also—and indeed primarily—as a medium of exchange of ideas, opinions, and beliefs. Speech is protected for its capacity to persuade, not only for its ability to express conclusions to those who already share them.

Similarly, the freedoms of association and of religious exercise include more than the ability to practice one's received belief in solitude or in the company of one's fellow believers or sympathizers. Such freedoms also include the freedom to convert the previously *unconverted* and to form associations with former strangers.

The First Amendment therefore protects uninvited exposure to messages and encounters which are novel, unfamiliar, unusual, or disfavored—all on the premise that an open society cannot flourish among closed minds and shielded souls. In short, the freedoms of speech, religion, and association protect the *expansion* of consciousness, not its confinement. And the value of informed choice accordingly prevents the state from abridging speech on the "paternalistic" premise that the public—including all of the potential listeners, sympathizers or converts it contains—is better kept "in ignorance." *Virginia State Board of Pharmacy*, 425 U.S. at 769-70.

For these reasons, speech may never be shut off simply because it disrupts some listeners' complacency, and certainly not because a legislative majority believes that such speech *might* do so. For this Court has written that free speech can

> indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Terminiello v. *City of Chicago*, 337 U.S. 1, 4 (1949). Just as government may not compel one to hear out a message one finds undesirable, so too it may not preempt the

"full opportunity for everyone to receive the message" before deciding how to respond. *Young* v. *American Mini Theatres, Inc.*, 427 U.S. at 76-77 (Powell, J., concurring). The potential unwillingness of a listener to accede to another's expression of devotion—including a request that the listener contribute to the practice of the speaker's religion—can never justify the state's silencing of the religious speaker, even where that speaker offends the listener's own religion. *Cantwell* v. *Connecticut*, 310 U.S. at 309-10. Even more plainly, the state may not silence the religious speaker who simply, as here, invites others by non-offensive and noncoercive means to join the speaker's faith, or to make some small sacrifice to signify a willingness to consider joining it.

B. *In a Public Forum Through Which Crowds Move Freely, the Constitution Leaves Solely With Individuals, Not With the State, the Choice to Decline Proffered Communications.*

Petitioners contend that state officials' wholly speculative assumption that some fairgoers might be annoyed, offended, or unwilling to endure religious distributions or solicitations made in the public areas of the Fair justifies a rule precluding *all* fairgoers from encountering these activities. *See* Br. Pet. at 21-24. In so contending, petitioners disregard this Court's teaching that a state may not, consonant with the First Amendment, substitute its judgment for that of the listener as to whether receiving a particular non-commercial, non-offensive communication is desirable. *See Martin* v. *City of Struthers*, 319 U.S. at 143 (Because the bearer of a message or the recipient of a written tract may "in fact [be] glad to receive it" even if it was not anticipated, an ordinance may not "protect" citizens from unanticipated communications "whether particular citizens want that protection or not.").

Wherever there is a willing speaker, the First Amendment protects that speaker's communication from being silenced in the name of hypothetically unwilling listeners—so long as such listeners are free to "avoid further bombardment of their sensibilities simply by averting their eyes," *Cohen* v. *California,* 403 U.S. at 21, by moving out of earshot, or by throwing unwanted literature away, *Consolidated Edison Co.* v. *Public Service Commission,* 100 S.Ct. 2326, 2336 (1980), as fairgoers plainly are. As Judge Weinstein concisely put the matter in the context of door-to-door leafleting and solicitation, "the Constitution does not allow government to create [even] a rebuttable presumption that people do not wish to be exposed to a particular class of ideas, or mode of expression. To override strong first amendment interests, the individual desiring privacy must assume the burden of indicating the choice to be left alone." *Troyer* v. *Town of Babylon,* 483 F. Supp. at 1138.

Since the First Amendment prevents a state from banning door-to-door speech on the presumption that listeners might be unwilling to hear it in their homes, *Martin* v. *City of Struthers, supra,* where the interests of privacy and solitude are strongest, it surely forbids similar regulation in a public forum, where there can, by definition, be little expectation of privacy or insulation from unanticipated and unsolicited ideas and expressions. *See, e.g., Farmer* v. *Moses,* 232 F. Supp. at 162 (World's Fair). Where privacy interests are attenuated (as at a state fair), and where the prohibited expressive activities are non-intrusive (as are distribution and solicitation, to be pursued further only with receptive persons), the state is constitutionally forbidden to shut off speech "solely to protect others from hearing it." *Cohen* v. *California,* 403 U.S. at 21 (preclusive regulation to protect interests depends on showing that "substantial

privacy interests are being invaded in an essentially intolerable manner").

Public distribution and solicitation among shifting crowds in a state fairground present none of the highly exceptional circumstances in which this Court has permitted government to preempt individuals' own choices of whether to decline a given communication. Even with a booth rule, people strolling through the public thoroughfares and park areas of a state fair are beckoned from all sides by exhibitors, vendors, and speakers vying for their attention. Across the space of the 125-acre fairgrounds in this case, "crowds are not captive but move freely to those places and booths they choose." *International Society for Krishna Consciousness, Inc.* v. *State Fair of Texas,* 461 F. Supp. 721 (N.D. Tex. 1978). Fairgoers can readily gain the same ambulatory freedom from unwanted leafleting or soliciting as they can from unwelcome oral encounters and from unwanted exhibitors in the booths themselves. *See* Opinion Below at A. 70. Petitioners' suggestion that individual fairgoers cannot walk away from or tune out unwelcome speech because the fairgrounds are "closed," Br. Pet. at 23, is specious. Were this true, no fairgoer could choose even among the booths whose messages he *desired* to hear.

Thus, fairgoers are in no sense a "captive audience," unable to avoid or to tune out the speakers' communication. They are not like homeowners who, even locked behind closed doors, cannot avoid the blare of sound trucks, *see Kovacs* v. *Cooper,* 336 U.S. 77, 87 (1949), nor like commuters who must stand or sit immobile for long periods continuously exposed to placard advertisements. *See Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 304 (1974); *id.* at 307 (Douglas, J., concurring).

Moreover, petitioners' suggestion that solicitors and leafleters in public areas will differ from those in booths

by inflicting "repeated" communications on fairgoers, *id.*, is entirely unsupported in the record and is surely incorrect. Any fairgoer who backtracks may twice hear, and twice walk away from, the repeated cries of even a booth-bound hawker; and the imagined difficulty of avoiding repeated encounters with a few roving book distributors or solicitors in a large fairground is sheer fantasy. At all events, it is no more difficult for a fairgoer to shake his head, withhold his hand, or move on when offered a scripture or asked for a contribution, than it is for a fairgoer similarly to decline to listen to such oral proselytism, repeated or otherwise, as even Rule 6.05 would allow in the Fair's public thoroughfares.

Nor are charitable leafleting and solicitation in any sense comparable to the offensive displays which the government might sometimes save the unsuspecting listener or viewer the trouble of tuning out, *see Young* v. *American Mini Theatres, Inc., supra; FCC* v. *Pacifica Foundation, supra.* Petitioners seek to preclude speech at the core, not at the margin, of the First Amendment's protection. *See* Argument § I(B) *supra.*

Nor, finally, is a Fair the sort of arena in which some special calm and decorum are required for the success of the enterprise. "Tidiness and tranquility are not qualities ordinarily found at fairs, nor are they qualities enshrined in the First Amendment." *Edwards* v. *Maryland State Fair & Agricultural Society,* 628 F.2d at 286. At a state fair, some degree of cacaphony among competing voices is the natural medium of communication, not a symptom of its frustration. Here, "verbal tumult [and] discord . . . are [not only] necessary side effects of . . . open debate," *Cohen* v. *California,* 430 U.S. at 24-25; they are its very essence.

Since the nature of neither the audience, nor the speech, nor the forum calls for a governmental hand on the

tuner, the state must leave squarely with each individual listener the decision whether to tune out—to decline, reject, or discard—the public communications at issue in this case. In short, the "unwilling audience" must be left "to turn away" from whatever speech it does not care to hear. *See FCC* v. *Pacifica Foundation,* 438 U.S. at 749 n.27. There is simply *no need* in a state fair for government to erect a shield around each listener—to surround *each listener* with a sound-proof, sight-free isolation booth created by law.

IV.

The Booth Rule's Supposed Secondary Purposes—Maintaining Order and Preventing Fraud—Fit the Rule Far Too Loosely to Justify It.

Neither the language of Rule 6.05, nor the construction given Rule 6.05 by the responsible state officials, identifies fraud, disorder, or congestion as the rule's targets.[25] Petitioners nonetheless attempt to justify the booth rule as serving substantial governmental interests in preventing fraud, *see* Br. Pet. at 24-29, and in promoting order and safety, *see id.* at 29-33; and petitioners claim that these interests would be frustrated by any regulation except one corralling all distribution and solicitation activities into booths without regard to whether any threat is actually posed to legitimate state interests in each particular case. *See id.* at 37-39.

Respondents neither seek protection for deceptive or disruptive expression, nor dispute the weight of the state's interests in regulating fraud and disorder. Respondents claim instead that the booth rule is at once suspiciously underinclusive and egregiously overinclusive with respect to

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[25] *See* Stip. of Facts, paras. 13, 16, at A.34-35.

both these goals. Even a regulation that "furthers an important or substantial government interest [which is] unrelated to the suppression of free expression" may inflict no "incidental restriction on alleged First Amendment freedoms . . . greater than is essential to the furtherance of that interest." *United States* v. *O'Brien,* 391 U.S. at 377.

The booth rule's restriction of protected expression is not merely "incidental." *See* Argument §§ I, II, III *supra.* But even assuming, for the sake of argument, that it *were* incidental, the rule's inhibition of core First Amendment freedoms would remain vastly broader than the effective prevention of fraud and maintenance of order at the Fair could ever require. The rule's overinclusiveness could readily be avoided through alternative state regulations much more narrowly and precisely tailored to these goals—as the state's own highest court itself determined.[26] This Court has consistently rejected regulations such as that involved here—regulations which, in pursuing a shortcut to some public purpose, needlessly trample First Amendment freedoms in their wake. *See* Argument § II *supra.*

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[26] As this Court has noted:

> Where . . . differing speculations as to the effect of a statute are plausible, we think it appropriate to defer to the decision of the [state's highest court], "armed as it was with the knowledge of the facts and the circumstances concerning the passage and potential impact of [the statute at issue], and familiar with the milieu in which that provision would operate."

Michael M. v. *Superior Court,* 49 U.S.L.W. 4273, 4275 n.10 (U.S. March 23, 1981) (plurality opinion of Rehnquist, J., joined by Burger, C.J., Stewart, and Powell, JJ.) *quoting Reitman* v. *Mulkey,* 387 U.S. 369, 378-79 (1967). *Cf. Minnesota* v. *Clover Leaf Creamery Co.,* 101 S.Ct. 715, 731-35 (1981) (Stevens, J., dissenting).

A. *The Booth Rule Bans Some, and Substantially Chills Other, Protected Communications Which Neither Deceive Nor Cause Congestion.*

The rule through which petitioners claim to be fighting fraud and disorder at the State Fair grossly restricts much expression having absolutely no connection with these harms. In so doing, the rule is facially overbroad, and is unconstitutional even if considered as a "time, place, or manner" regulation, for "in its reach it prohibits constitutionally protected conduct . . . [and thus] sweeps within its prohibition what may not be punished under the First and Fourteenth Amendments." *Grayned* v. *City of Rockford*, 408 U.S. at 114-15. *See* Argument § I *supra*.

The booth rule also inhibits speech in a second, separate —but similarly unconstitutional—way. By threatening punishment for engaging in proscribed activities—distribution and solicitation—whose boundaries are imprecise and insufficiently discernible in advance,[27] the rule powerfully deters other protected activities, including many that the state disavows any desire or need to regulate. The booth rule thus not only sweeps protected expression within its ban but also draws a line between the expression it permits and the expression it prohibits which chills much expression whose relation to that line is uncertain.

The ban on solicitation in the public areas of the Fair, for example, may severely chill many aspects of the verbal proselytism which petitioners describe current State Fair policy as protecting. Despite petitioners' assurance that

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[27] The present policy of the Minnesota State Fair is to request a booth-rule violator to leave the fairgrounds, and to expel him if he refuses. *See* Heffron Affidavit, para. 15, at A.27. Such a violator may also be prosecuted for a misdemeanor under Minn. Stat. § 37.16. *See* Opinion Below at A.60 n.2. In any case, expulsion and prosecution are similar inasmuch as both prevent expression attempted from without a booth.

Krishnas may speak freely with fairgoers in the Fair's open areas, and may from there "direct interested donors or purchasers to their booth," Br. Pet. at 36, it is far from clear that the ban on solicitation would not be interpreted to sweep just such advocacy and such informational statements within its reach. *See* n.28 *infra*. For statements of this sort might well trigger an arrest, *see* Stip. of Facts, para. 14, at A.34, and this prospect may in turn deter not merely much of what various religious and political speakers might *say* at the Fair, but also their very decision to *attend* the Fair in order to spread their beliefs and seek donations there.

This Court has regarded regulations rife with such ambiguous possibilities for enforcement as threats to free public discussion incompatible with the First Amendment. *See Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620-22 (1976). Indeed, in at least two other closely parallel instances, this Court has specifically struck down rules which, in banning "solicitations," threatened impermissibly to chill spoken statements often indistinguishable from such solicitation both from the standpoint of the potential speaker and from that of the potential enforcer. In *Thomas* v. *Collins*, 323 U.S. 516 (1945), a statute requiring labor organizers to register before "soliciting" union members was struck down because the Court found that "the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker . . . wholly at the mercy of the varied understanding of his hearers. . . . Such a distinction offers no security for free discussion." *Id.* at 535-36. The vice of the anti-solicitation statute there was not merely that instances of enforcement might be inconsistent, but that the uncertainty and doubt speakers might entertain as to what statements were forbidden could well cause them not to speak at all. *Id.* at 537. And in *In re Primus*, 436 U.S. 412 (1978), this Court again condemned

the chilling potential inherent in the ambiguity of an anti-solicitation rule.[28] To one who would advocate contributions to a political or religious cause at the State Fair, or to one who would merely inform fairgoers as to how to make such donations, the booth rule's solicitation ban poses no less a threat, and creates no less a chill.[29]

B. *The First Amendment Forbids Prophylactic Rules Which Ban or Substantially Chill Protected Expression, and Serve Permissible State Purposes Only Indirectly.*

Petitioners defend the use of the booth rule to forbid some protected communications and to deter others without anywhere alleging that all acts thereby prevented are deceptive or disruptive. Petitioners merely appear to find total prophylaxis easier and cheaper to administer than individualized regulation of actually deceitful or disorderly conduct. *See* Br. Pet. at 25, 27-28, 38. But this preference for convenience is not petitioners' to indulge. "Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone."

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[28] Notwithstanding [the state's] concession in this Court, it is far from clear that a lawyer may communicate the organization's offer of legal assistance [even] at an *informational* meeting . . . without breaching the literal terms of the [anti-solicitation] Rule.

In re Primus, 436 U.S. at 433 (emphasis added).

[29] *Cf. Coates* v. *City of Cincinnati*, 402 U.S. at 614 (annoyance to others states an "unacceptable standard"). The chill created by the state's interpretation of Rule 6.05 is heightened by the fact that state authorities have *already* radically stretched the literal text of the rule—which covers only the "sale, or distribution of any merchandise, including printed or written material," *see* Stip. of Facts, para. 13, at A.34—to encompass solicitation of contributions to a religion. How such a stretch could be counted on by devotees to stop short of *other* verbal appeals is utterly unclear, especially since "solicitation may be viewed as one form of proselytism." A.70 (Todd, J., dissenting in part).

NAACP v. *Button*, 371 U.S. 415, 438 (1963). Because broady prophylactic rules, aimed only indirectly at serving such legitimate state purposes as the control of fraud or of congestion, may chill many harmless and protected communications, the First Amendment requires the state to proceed through particularized rules applied on "an individualized basis." *Grayned* v. *City of Rockford*, 408 U.S. at 119-20. *See also Village of Schaumburg*, 444 U.S. at 637.[30]

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[30] This principle was reiterated in *In re Primus*, 436 U.S. at 434, where this Court held that a state may not enforce a rule broadly prohibiting lawyers' unsolicited offers of services against organizations which "engage[] in litigation for effective political expression and association, as well as . . . communicati[on] [of] useful information to the public." *Id.* at 431. Because banning such solicitation would predictably chill proper as well as improper solicitation in connection with such litigation, the Court held that the First Amendment allows only restrospective penalties for such actual misconduct as overreaching or misrepresentation, *id.* at 433-34, not punishment of "mere solicitation unaccompanied by [specific] proof of any . . . substantive evils." *Id.* at 433. Petitioners here enjoy no more constitutional latitude than did the state bar in *Primus* to regulate prophylactically expression lying at the core of the First Amendment.

Prophylactic regulation is permissible only where it falls *solely* upon expression *outside* the core of the First Amendment. When a regulation's line-drawing involves little "threat to the free market in ideas and expression," such as when the activities regulated are "on the borderline between pornography and artistic expression," *Young* v. *American Mini Theatres, Inc.*, 427 U.S. at 61; *see also FCC* v. *Pacifica Foundation*, 438 U.S. at 743, a greater potential for chilling contemplated expression has been tolerated than when "the free dissemination of ideas of social and political significance" is at stake. *Young* v. *American Mini Theatres, Inc.* 427 U.S. at 61. Moreover, where expression is motivated purely by commercial profit, this Court has upheld "prophylactic measures whose objective is the prevention of harm before it occurs." *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 464 (1978). But, of course, neither marginal nor commercial speech is at stake in this case.

C. *Narrow Rules Which Precisely Regulate Fraud and Congestion, and Which Are Far Less Restrictive of Protected Expression Than the Booth Rule, Remain Open to the State.*

The record in this case is utterly devoid of any showing that fraudulent solicitations,[31] or crowd congestion in the vicinity of public distributions or solicitations, cannot be successfully regulated by means significantly less restrictive than the booth rule. Without such a showing, courts considering preclusive rules in similar circumstances have consistently rejected state justifications based on the kinds of speculative possibilities and undifferentiated fears on which the state relies here.[32] While respondents have dem-

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[31] Petitioners raise not even a spectre of fraudulent *distributions*, as opposed to fraudulent *solicitations*. *See* Br. Pet. at 24-29. Thus the booth rule is especially overinclusive in sweeping distribution within its ban. And, so far as the control of fraudulent solicitation is concerned, the rule's failure on its face even to *address* solicitation *as such* seriously undercuts the state's current reliance on this goal.

[32] *See Tinker* v. *Des Moines Independent Community School District*, 393 U.S. at 508 ("In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."). Yet the affidavit of Fair Manager Heffron, which constitutes virtually the entire factual record on the basis of which the state claims that the booth rule is essential to prevent congestion at the Fair, contains nothing more than general statistics about the Minnesota State Fair and irrelevant speculations about what might ensue if the booth rule were lifted and an "*unlimited number* of [Krishna Consciousness] devotees [were given] access to *all public areas* of the fairgrounds to *dance, sing or chant* or to sell . . . and distribute *other products without restriction* . . . ." Second Heffron Affidavit at A.44-49 (emphasis added). Respondents of course urge no such thing.

Similar mere speculations were found insufficient in such cases as *Edwards* v. *Maryland State Fair & Agricultural Society*, 628 F.2d at 286 (4th Cir. 1980); *International Society for Krishna Consciousness, Inc.* v. *Colorado State Fair & Industrial Exposition*, 610 P.2d 486, 489 n.1 (Colo. 1980). *Cf. Wright* v. *Chief of Transit Police*, 558 F.2d 67, 69 (2d Cir. 1977) (rejecting state's conclusory justification of blanket ban on distribution in subways on basis of undifferentiated "public safety" considerations, inasmuch as it cannot be simply assumed, without more, that less restrictive regulations could not achieve that goal).

onstrated their willingness throughout this action to submit to numerous less restrictive regulations, *see* Stip. of Facts, para. 23, at A. 36; Opinion Below at A. 66 & n. 9, petitioners have neither made any effort to experiment with such regulations,[33] nor presented any legitimate reason for ruling them out.[34]

1. Less Restrictive Means of Preventing Fraud.

This Court has never upheld a law broadly restricting speech, press, or religious exercise on the sole basis that, without the restriction, fraud would be more likely to occur or more difficult to restrain or redress. Rather, as this Court recently reiterated in *Village of Schaumburg, supra,* the government's "legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentation can be prohibited and the penal laws used to punish such conduct directly." 444 U.S. at 637. This doctrine has long standing in First Amendment law. *See Schneider* v. *State,* 308 U.S. at 164; *Cantwell* v. *Connecticut,* 310 U.S. at 306. The circumstances of this case present no reason to accept petitioners' invitation to overturn it.

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[33] Thus there is no indication in the record that even one of the Krishna Consciousness members supposedly guilty of misconduct on prior occasions was proceeded against civilly or criminally under any of the state's generally applicable laws, and there is no indication that such more particular measures as are suggested below were ever invoked.

[34] Petitioners' allusions to the difficulties or incremental expenses that might be encountered in administering individualized prosecutions—as opposed to enforcing a broad, preclusive ban on all public distribution or solicitation—are unavailing. *See* Br. Pet. at 27, 28, 30. This Court long ago acknowledged that individualized prosecutions may be "less efficient and convenient" than preclusive rules, but that "the answer [to such countervailing claims of administrative convenience] is that considerations of this sort do not empower [government] to abridge freedom of speech and press." *Schneider* v. *State,* 308 U.S. at 164. *See also Village of Schaumburg,* 444 U.S. at 639; *Edwards* v. *Maryland State Fair & Agricultural Society,* 628 F.2d at 287.

Nothing stands in the way of petitioners' banning and individually penalizing fraudulent solicitations at the Fair, or of their enacting specific regulations which would aid in the enforcement of such bans and penalties without abridging communication protected by the First Amendment. For example, solicitors might be required to register at the Fair's security office, daily or otherwise, before soliciting —in order "to establish [their] identity and . . . authority to act for the cause which [they] purport to represent." *Cantwell* v. *Connecticut*, 310 U.S. at 306. Those who engage in solicitation might even be required to wear identification badges bearing the names of their organizations, thereby avoiding the appearance of an official Fair imprimatur.[35] In this way, the small fraction of political or religious solicitations which may be fraudulent could be policed and individually prosecuted after the fact. But the state cannot combat fraud by barring, wholesale, every communicative context in which it might arise.[36]

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[35] It was indeed the requirements of disclosure and identification that this Court recently suggested as supplements to criminal prosecution in *Village of Schaumburg*, 444 U.S. at 637-38 n.12, in a passage petitioners misleadingly cite to support the validity of a sweeping ban. Br. Pet. at 28-29.

[36] *See also* n.31 *supra*. This Court has never viewed the potential for what petitioners colorfully call "hit and run" fraudulent solicitations in such open spaces as parks and streets, *see* Br. Pet. at 25, as a reason to make an exception to this doctrine. Any such potential for abuse furnishes no more basis for an exception in the context of a state fair. *See* Argument § I(A) *supra*. The problems of policing peripatetic fraud at a fair are surely no greater than are the problems of doing so in other open areas. No one would suggest that expression in midtown Manhattan or on the Mall in Washington, D.C., should be confined to booths—although the problems of area, numbers of people, foreign visitors, and the difficulty of tracing offenders must be many times as great in the cities as at a state fair. In any event, if petitioners were right, then violations of Rule 6.05 itself would be as difficult to detect and control as would violations of less drastic regulations proposed in Rule 6.05's stead.

2. Less Restrictive Means of Preventing Congestion.

In rejecting petitioners' contention below that the need to maintain order on the fairgrounds could justify the exclusion of all political and religious distribution and solicitation from such public forums, the Minnesota Supreme Court properly noted that "[c]onduct that tends to create disorder on the fairgrounds may be *specifically* prohibited." A. 65 (emphasis added).[37] The state could readily avoid any undue congestion attending such activities by, for example, limiting the total number of roving distributors and solicitors allowed to move about each day, *cf. Richmond*

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[37] Indeed, that maintaining public order and combatting congestion are even *genuine goals* of the booth restriction is brought into serious question by the rule's striking underinclusiveness with respect to these objectives in particular. The rule includes within its ban all solicitation and distribution of literature except from a booth, but not oral proselytizing throughout the public areas of the fairgrounds. Petitioners assert that even "a few roving solicitors" can break down the Fair's "crowd control." Br. Pet. at 30-31. Yet, as both the majority, *see* A. 64, and the minority, *see* A. 70-71, of the court below agreed, roving oral proselytizing in fact implicates exactly the same supposed state interests in crowd control as do solicitation and distribution. An operator may gather as large a crowd as any pamphleter or solicitor. And as this Court has written in parallel circumstances, "the underinclusiveness of the statute . . . undermines the likelihood of a genuine state interest . . . [and] the plausibility of the state's purported concern . . . ." *First National Bank* v. *Bellotti*, 435 U.S. 765, 793 (1978) (statute supposedly preventing corporate use of funds for expression with which some shareholders might disagree included within its ban referendum but not lobbying expenditures, and included banks and business corporations but not other interest-holding organizations). *See also Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 104-05 (1979) (statute supposedly protecting anonymity of juvenile offenders included within its ban newspapers but not other media); *id.* at 110 (Rehnquist, J., concurring in judgment) ("It is difficult to take very seriously West Virginia's asserted need to preserve the anonymity of its youthful offenders when it permits other equally, if not more, effective means of mass communication to distribute this information without fear of punishment.").

Newspapers, Inc. v. *Virginia*, 100 S.Ct. at 2830 n.18 (plurality opinion of Burger, C.J., joined by White and Stevens, JJ.); by proscribing solicitation and distribution too close to entrances or exits, or to crowds standing in line for other events; by specifically prohibiting and individually penalizing obstruction of the free passage of pedestrians, *see Cameron* v. *Johnson*, 390 U.S. 611, 612, 616-17 (1968); or by enforcing other similarly narrow and precise regulations shown to be necessary by experience and not merely rationalized as useful to cope with imagined difficulties.[38] Such restrictions have been found workable in the course of their implementation by other courts both in the state fair con-

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[38] Falling into just this category is the suggestion of the minority opinion below, *see* A. 71-72, that confusion and crowding might be so exacerbated by fairgoers' "fumbling for and dropping money," *id.* at A. 71, as to warrant a rule requiring all sales and donations to be *consummated* at a rented booth. *Accord, International Society for Krishna Consciousness, Inc.* v. *Eaves*, 601 F.2d 809, 828 (5th Cir. 1979) (upholding rule that donations at airport may be accepted only at designated booths). There is nothing in the record to support such a notion, and petitioners do not appear to press it in this Court. Needless to say, even this alternative—while less restrictive than a rule requiring distributions and solicitations to be confined to booths from start to finish—would cut deeply into the ability of peripatetic devotees to collect the funds they need from persons willing to buy literature or make donations but unwilling to "walk a mile" to do so. It may be worthy of note that the proposed U.S. General Services Administration Rules and Regulations Governing Public Buildings and Grounds, 45 Fed. Reg. 10382 (1980) (proposed to be codified in 41 C.F.R. § 101-20.707(a)(6)), which would have prohibited any person from "receiv[ing] or accept[ing] any donation of money except at a 'solicitation booth' . . . ," was deleted from the final rule. *See* 46 Fed. Reg. 3523, 3524 (1981) (to be codified in 41 C.F.R. parts 101-20). *See also* Federal Aviation Administration Soliciting and Leafletting Procedures at National and Dulles International Airports, 45 Fed. Reg. 35314 (1980) (to be codified in 14 C.F.R. part 159), *effective date deferred*, 45 Fed. Reg. 49917 (1980); Opinion of Assistant Solicitor, Parks and Recreation, U.S. Dep't of Interior (Sept. 11, 1978) (booth rule considered but rejected for national park areas) (unreported).

text[39] and in the context of other public places.[40] They cannot simply be bypassed here.

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[39] *See, e.g., Wilson* v. *Alameda County Fair,* No. C 79-1467 SAW (N.D.Cal. Dec. 5, 1979) (stipulation and order) (area limitations and identification badges); *Khurana* v. *Monroe County Fair,* No. 973138 (E.D.Mich. July 28, 1980) (consent judgment) (peripatetic solicitors must wear identification badges and remain at least five feet from booths); *Mills* v. *State Fair of West Virginia,* Civ. No. 78-5167 (S.D.W.Va. May 29, 1979) (consent order) (solicitors must wear identification badges and remain at least fifteen feet from entrances and exits); *Gorrick* v. *Erie County Agricultural Society,* No. 78-505 (W.D.N.Y. Aug. 24, 1978) (dismissed pursuant to agreement of parties) (limitation on number of roving solicitors); *International Society for Krishna Consciousness, Inc.* v. *New Mexico State Fair,* Civ. No. 77-0568 (D.N.M. March 2, 1978) (dismissed pursuant to settlement) (numbers and area limitations); *International Society for Krishna Consciousness, Inc.* v. *Wetzel,* No. 77-846 Phx WPC (D.Ariz. Nov. 7, 1977) (Arizona State Fair) (exclusion from certain buildings) (dismissed as moot following agreement of parties).

[40] *See, e.g., International Society for Krishna Consciousness, Inc.* v. *Rochford,* 585 F.2d at 272-73 (religious expression allowed in all areas of airport except for specifically proscribed places where such expression might, *e.g.,* seriously impede traffic flow); *International Society for Krishna Consciousness, Inc.* v. *McAvey,* 450 F. Supp. 1265 (S.D.N.Y. 1978) (specific place regulations, not wholesale ban, upheld at World Trade Center). *But see* Opinion Below at A. 66 n.10 (Minnesota Supreme Court's caveat that such place regulation cannot be mechanically copied, but must be tailored specifically to each factual setting). At an earlier stage of these proceedings, petitioners themselves proposed a set of alternative regulations which they asked the courts below to impose if the booth rule were held to be unconstitutional. Defendants' Memorandum in Support of Cross Motion for Summary Judgment 14-15 (filed Aug. 18, 1978). The Fair's proposals included a limitation on the total number of solicitors and literature distributors, a prohibition against approaching patrons standing in lines or seated for a performance, identification and registration of leafleters and solicitors, and a ban on approaching patrons below a given age. Respondents have not objected to these alternatives, and although petitioners no longer advocate their adoption, petitioners have never successfully explained why these alternatives in particular are not adequate to meet the state's needs.

V.

Sustaining the Judgment Below Portends No Dilemma Between Favoritism and Chaos.

To justify denying the right to distribute literature and to solicit contributions to all but those who confine such activities to leased booths, petitioners finally paint a completely unsubstantiated picture of the "chaos" they claim would ensue unless nothing short of so broad and preclusive a rule as Rule 6.05 were allowed. Br. Pet. at 32. Petitioners further mischaracterize respondents' claim as an appeal for exceptional treatment relative to other groups—a claim for "entitle[ment] to *greater* constitutional protection than [that accorded] the free speech rights of competing organizations." Br. Pet. at 21 (emphasis added). *See also id.* at 19-20. Both these assertions are groundless.

A. *It Is Not Favoritism Toward Rights of Political and Religious Speech and Free Exercise to Strike Down Rules That Abridge Such Rights, Nor Is It Favoritism to Treat Political and Religious Speech Differently From Commercial Speech.*

Respondents claim that the booth rule is facially invalid insofar as it bars distribution and solicitation by political and religious message-bearers in the open and public areas of the Fair. Respondents seek no unique treatment within this category.[41] Respondents claim only that their activities, and those of other groups and individuals seeking to exercise speech and religious rights similarly located at the core of the First Amendment, merit treatment more

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[41] To be sure, insofar as respondents' religion mandates *sankirtan*—peripatetic public solicitation of religious contributions and distribution of religious texts, *see* n.13 *supra*—the claims advanced herein are strengthened, *see Wisconsin* v. *Yoder*, 406 U.S. 205, 222-29, 235-36 (1972); *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963). But respondents' case in no way *depends* upon any such showing.

accommodating that which the Constitution mandates with respect to commercial speakers.

The booth rule is unconstitutional because it wholly excludes substantial categories of fundamentally protected communications from a public forum, *see* Argument § I *supra,* while failing to serve any permissible and significant state purpose in a sufficiently narrow and precise manner. *See* Argument §§ II, III, IV *supra.* Such a rule is not saved by the fact that it sweeps protected as well as unproctected expression equally within its ban: that is one of the rule's fatal infirmities. That the prohibition applies identically "to all persons or groups who wish to sell or exhibit . . . [or to] solicit contributions or distribute materials at the fair," Br. Pet. at 11, does not cure but aggravates its illegitimacy.

As this Court has stated in another contest involving an ordinance which abridged the rights to distribute religious literature and to solicit contributions, "the fact that the ordinance is 'nondiscriminatory' [in this sense] is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike." *Murdock* v. *Pennsylvania,* 319 U.S. at 112. Even though this Court has extended to "peddlers" some protection under the First Amendment, it has clearly stated the caveat that "commercial speech remains 'not undifferentiable from other forms of speech.'" *Virginia State Board of Pharmacy,* 425 U.S. at 771-72 n.25 (citation omitted).[42]

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[42] *Compare In re Primus,* 436 U.S. at 434 ("Where political expression . . . is at issue, this Court has not tolerated the de-

Petitioners need not, under the First Amendment, extend to commercial exhibitors, distributors, or solicitors the same latitude in the open, public street and park areas of the State Fair that they must extend there to religious and political speakers.[43] Indeed, to treat these unequals equally would be a harsh, and unconstitutional, form of discrimination.[44]

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gree of imprecision that often characterizes government regulation of the conduct of commercial affairs."), *with Ohralik* v. *Ohio State Bar Association*, 436 U.S. at 459, 467 (upholding anti-solicitation rule as applied to commercial solicitation solely for pecuniary motives, and distinguishing *Primus'* rejection of similar rule as to solicitation intertwined with political association and expression).

[43] Government is not free to regulate religious and political speakers as strictly as commercial vendors. *Compare Martin* v. *City of Struthers, supra* (ordinance banning handbilling by political and religious distributors held unconstitutional), *with Breard* v. *City of Alexandria*, 341 U.S. 622, 641 (1951) (upholding ordinance requiring householder consent to commercial solicitation, and observing that similar ordinance might abridge rights of "advocates of ideas," as opposed to "solicitors for gadgets or brushes"). *Also compare International Society for Krishna Consciousness, Inc.* v. *City of New Orleans*, 347 F.Supp. 945 (E.D. La. 1972) (striking down ordinance barring charitable, religious, and educational solicitation in the Vieux Carre—the French Quarter, heart of New Orleans tourism—as an abridgment of religious exercise requiring compelling justification, which state did not show), *with City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976) (upholding as rational exercise of local economic power a regulation evicting all but two pre-existing pushcart food vendors from the streets of the Vieux Carre).

[44] As this Court has noted elsewhere, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971). *See also Griffin* v. *Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring in judgment) ("To sanction such a ruthless consequence would justify a latter-day Anatole France to add one more item to his ironic comments on the 'majestic equality' of the law . . . '[which] forbids the rich as well as the poor to sleep under bridges, [and] to beg in the streets[.]'") (citation omitted).

B. *Sustaining the Judgment Below Threatens No Chaos From Religious, Political, or Other Expression at the Core of the First Amendment.*

Petitioners engage in the sheerest speculation when they suggest that even the loosely ordered liberty of the Fair will break down if religious and political distribution and solicitation are not subject to Rule 6.05's wholesale banishment from the open and public areas of the Fair. Br. Pet. at 31, 32.

First, the state need not permit commercial vendors to operate in these areas. *See* Argument § V(A) *supra.* Second, the state can point to absolutely no evidence on this record, or on the records of the many other cases in which courts have struck down similar booth rules in recent years,[45] that large numbers of other distributors and solicitors will in fact flock to the Fair's open areas to undertake the arduous and often unrewarding work of initiating contacts with fairgoers.[46] Finally, the state is free to set narrow time, place, or manner regulations which would modulate the numbers and locations of this flock should its growth prove truly problematic. *See* Argument § IV *supra.* Respondents' claim is only that the state cannot, in the name of order, impose exile.

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[45] *See, e.g., Edwards* v. *Maryland State Fair & Agricultural Society, supra* (4th Cir. 1980); *International Society for Krishna Consciousness, Inc.* v. *Bowen, supra* (7th Cir. 1979); *International Society for Krishna Consciousness, Inc.* v. *State Fair of Texas, supra* (N.D.Tex. 1978); *International Society for Krishna Consciousness, Inc.* v. *Colorado State Fair & Industrial Exposition, supra* (Colo. 1980).

[46] Exemption from the booth rule is in no way comparable to exemption from a work requirement, *Sherbert* v. *Verner, supra,* or from a requirement of military service, *Gillette* v. *United States,* 401 U.S. 437 (1971), or indeed from any other requirement that the insincere and indolent might be tempted to challenge as a way of obtaining benefits or avoiding burdens at little or no personal cost. Particularly in a case such as this, therefore, fears of unmanageably numerous requests for exemptions are inherently implausible—as the history of booth-rule's invalidation itself strongly suggests.

CONCLUSION

The highest court of Minnesota found no basis for regarding that state's interests here as requiring abridgment of the First Amendment rights at issue in this case. Both the deference to which such a determination is entitled, and the protection which First Amendment activities are generally due, strongly counsel affirming that decision.

Respectfully submitted,

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